ing without objection the user of others of the land I hold that he abandoned any customary rights which he may have acquired either by himself or in any other manner over the land.

For this reason I refuse the declarations asked for and dismiss the plaintiff's claim with costs which I assess at $75.

Claim dismissed.

LOH THYE CHOON v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) June 6, 1967]

[K.L. — Criminal Appeal No. 36 of 1967]

Penal Code, s. 304A — Causing death by negligent act — Charge — Not necessary to give particulars in — Post-mortem report in the absence of other evidence did not state death caused by accident — Charge unproved — Criminal Procedure Code (Cap. 6), ss. 332 and 340.

The appellant in this case was charged with an offence under section 34A of the Road Traffic Ordinance, 1958. At the end of the case for the prosecution the charge was amended to one under section 304A of the Penal Code. The appellant was found guilty and was convicted and fined a sum of $1,000 in default six months imprisonment and disqualified from driving for a period of twelve months. Against this decision the appellant appealed.

The first ground of appeal was that as the amended charge did not contain particulars of negligence it was bad in law and the conviction could not therefore be sustained. The second ground of appeal related to the admission of post-mortem report. It was urged that sections 332 and 340 of the Criminal Procedure Code had no application to the circumstances of this case and had that evidence been rejected, as it should have been, there was no evidence as to the cause of death. For reasons best known to the prosecution, the pathologist was not called to give evidence at the trial.

Held: (1) it was not necessary that the particulars of alleged negligence be stated in the charge;

(2) on the assumption that the medical report was properly admitted it cannot be said that the essential ingredients that the death of the deceased was the direct result of the negligent act of the appellant had been proved to the hilt.

Cases referred to:—

(1) *Public Prosecutor* v. *Ahmad bin Din* [1956] M.L.J. 235.

(2) *Public Prosecutor* v. *Marimuthu* (K.L. Criminal Appeal No. 43 of 1961. unreported).

(3) *Todrick* v. *Dennelar* (1905), 42 Sc. L.R. 199.

(4) *Kurban Hussein* v. *State of Mahrashtra* [1965] 2 S.C.R. 622; A.I.R. 1965 S.C. 1616.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Hashim bin Majid (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: The appellant was charged with an offence under section 34A of the Road Traffic Ordinance, 1958. At the end of the case for the prosecution the charge was amended to one under section 304A of the Penal Code. He was found guilty and was convicted and fined a sum of $1,000 in default six months' imprisonment and disqualified from driving for a period of twelve months. The amended charge read:—

"That you on or about 20.1.1965 at about 5.45 p.m. at Jalan Birch, in the District of Kuala Lumpur, being the driver of motor-lorry N.B. 1596 did cause the death of one Low Chuen alias Liew Chuen, by doing a negligent act not amounting to culpable homicide and thereby committed an offence punishable under section 304A of the Penal Code".

At the hearing the following facts were proved. On 20th January, 1965 at about 5.45 p.m. the deceased was riding a scooter with a pillion rider along Birch Road and was heading towards Merdeka Circle from the direction of Edinburgh Circle. A lorry driven by the defendant emerged from a row of shop-houses on the (deceased's) left and cut across the path of the on-coming scooter. The lorry intended to cross to the other side of Birch Road. A collision occurred between the two vehicles and both the deceased and his pillion rider were thrown on to the road. The deceased was admitted to hospital and died eight days later. The scene of the accident is a straight stretch of road 49 feet wide and there is a white dividing line in the centre. The length of the lorry was 25 feet — slightly more than one-half of the width of the road. The weather was good and the road dry. There were no marks on the road.

I can dispose summarily of the appellant's first submission that as the amended charge contained no particulars of negligence it is bad in law and a conviction cannot therefore be sustained. The essence of the charge is the negligent driving and it is not either usual or necessary to particularise the alleged negligence in the charge. I need hardly say that in arriving at this decision I am adopting the principle laid down in *Public Prosecutor* v. *Ahmad bin Din* (1) which was followed in *Public Prosecutor* v. *S. Marimuthu.*(2) In the United Kingdom the same principle would seem to apply (see footnote (h) in Vol. 2, *Stone's* Justices' Manual, 1965, at p. 2333 where the case of *Todrick* v. *Dennelar* (3) is mentioned).

The second ground of appeal relates to the admission of the post-mortem report. It is said that the provisions of section 332 and section 340 of the Criminal Procedure Code have no application to the circumstances of this case and had that evidence been rejected, as it should have been, there is no evidence as to the cause of death. For reasons best known to the prosecution, the pathologist was not called to give evidence at the trial. In the view which I take of this case it is not necessary to express any opinion on this point. On the assumption that the medical report was properly admitted it cannot be said that the essential ingredient that

the death of the deceased was the direct result of the negligent act of the appellant had been proved to the hilt (see *Kurban Hussein* v. *State of Mahrashtra* (4)). The cause of death which reads, "Small abrasions over front of right chest about the middle" is not consistent with probability that the deceased met his death as the direct result of a road accident. Where there is a doubt in the prosecution case, it must be resolved in favour of the appellant. On this ground the conviction under section 304A Penal Code cannot stand.

It is my opinion that the facts as found by the learned president warranted a finding of inconsiderate driving. I will therefore set aside the conviction and sentence imposed by the learned president under section 304A Penal Code and substitute a conviction and a fine of $200 under section 36(1) of the Road Traffic Ordinance. The order of disqualification is also set aside and in its place I order endorsement of his driving licence. Any excess of payment of fine will be refunded to the appellant.

Appeal allowed.

Solicitors: *Joseph & Son.*

LIM KER v. CHEW SEOK TEE

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) June 26, 1967]

[Penang — Federal Court Civil Appeal No. X. 99 of 1966]

Practice and Procedure — Execution — Illegal execution — Sale of temporary type of building — Is this chattel house or personal chattel — Entering into possession is equivalent to delivery of possession of chattel.

Practice and Procedure — Costs — When successful party entitled to costs as of right.

Practice and Procedure — Judge procuring further evidence — No right to call on his own initiative and without consent of parties — Practice undesirable.

This was an appeal against the decision of Yong J. ([1967] 1 M.L.J. 236) reversing the judgment of the President of the Sessions Court at Sungei Patani and declaring that the respondent was the owner of a house at Lunas, which consequently was not liable to attachment upon a decree obtained by the appellant in the Sessions Court against one *T*. *T* was the *quondam* owner of the house which was built on land belonging to another. On June 25 1962 he sold it to the respondent and gave her a note or memorandum of the sale, which was stamped for *ad valorem* duty at the Stamp Office the same day the respondent went into possession of the house. On June 26, the respondent delivered to the Lunas Local Council both the sale note and a letter signed by the vendor requesting registration of the house in the name of the new owner for payment of local rates. Council approval of the change was given on June 27, 1962 and endorsed on the application.

On July 7, 1962, *T* drew two cheques and delivered them to the appellant. On July 30, *T* was sued thereon and a decree obtained against him in due course. On June 21, 1964 the appellant's solicitors sought information from the clerk in the local council regarding the ownership of the house in question with a view to levying execution. They were informed that the owner was *T*, and the house was thereupon attached on June 25, 1964. As a result of the solicitors' inquiry the local council clerk found that he had forgotten to record the change of ownership, which he should have done on June 26, 1962. He informed the appellant's solicitors to that effect on June 30, 1964 and rectified the error in the register by an entry on that date. The execution, however, was not withdrawn and on July 3, 1964 the respondent was compelled to lodge her objection, claiming ownership of the property.

Held: (1) a judgment creditor can levy execution only on property belonging to the debtor or appearing to belong to him by reason of being in his apparent possession, not on property belonging to any third party at the creditor's mere whim and fancy;

(2) the learned judge in this case was right in allowing the appeal of the objector (respondent in this appeal) and this appeal was therefore dismissed.

After the objector had closed her case and no evidence was adduced by the plaintiff, the learned president of the sessions court himself called one witness and examined him at length.

Held: it is so well established in our law that the judge is not allowed in a civil action to call a witness whom he thinks might throw some light on the facts without the consent of the parties.

Per Ong Hock Thye F.J.: Where a party successfully enforces a legal right and in no way misconducts himself he is entitled to costs as of right.

Cases referred to:—

(1) *In re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 K.B. 327.

(2) *Jones* v. *National Coal Board* [1957] 2 Q.B. 55, 64.

(3) *Jones* v. *Curling* (1884), 13 Q.B.D. 262, 265.

(4) *Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732, 811-812.

FEDERAL COURT.

Lim Kean Siew for the appellant.

C. O. Lim (*Oo Gin Sun* with him) for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: The plaintiff obtained judgment against the defendant in Sungei Patani Sessions Court Civil Action No. 22 of 1963 and in execution of the decree attached house No. 7-B, Kampong Bharu, Lunas. Chew Seok Tee, a Chinese lady (hereinafter called the objector) objected to the attachment on the ground that she was the owner of the said house. She gave evidence before the Sessions Court that on 25th June, 1962, she purchased the house from the defendant who gave her a document of sale (Exhibit P.1). The learned president dismissed her objection. She then appealed to the High Court which allowed her appeal. The plaintiff now appeals to this court.

The appeal was heard in Penang and we dismissed it, intimating that we would give written judgment later and we now do so.